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No. 94-504

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

STUART G. YEOMAN, M.D., et al. - - Petitioners
versus
COMMONWEALTH OF KENTUCKY
REVENUE CABINET, et al. - - - Respondents

AND

No. 94-525

CHARLES C. SMITH, JR., M.D., et al. - Petitioners
versus
COMMONWEALTH OF KENTUCKY
REVENUE CABINET, et al. - - - Respondents

On Petitions for a Writ of Certiorari
to the Supreme Court of Kentucky

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether three sitting special supreme court justices appointed by the governor in accordance with Section 110(3) of the Kentucky Constitution should have disqualified themselves when there was no allegation or evidence in the record of impropriety, bias or prejudice on the part of any of those special justices.

2. Whether a state health care provider tax imposed on physicians violates the prohibition against special legislation contained in Section 59 of the Kentucky Constitution.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents accept the statement of the case as set forth by the Petitioners, except as clarified or modified herein.

The health care provider tax statute in question was challenged in the trial court as violating the Petitioners'

rights under the Fifth and Fourteenth Amendments to the U.S. Constitution, and Sections 2, 3, and 59 of the Kentucky Constitution, but both the trial court and the Supreme Court of Kentucky's rulings rested on Section 59 of the Kentucky Constitution. *Commonwealth* v. *Smith*, Ky., 875 S.W.2d 873 (1994); *Yeoman* Pet. 31a-49a. The Petitioners sued the Revenue Cabinet and its Secretary, the Cabinet for Human Resources and its Secretary, and the Kentucky Health Care Data Commission. The Governor of Kentucky, Brereton C. Jones, was not a party-defendant, and is not a respondent herein.

The tax was contained in House Bill 1 (HB 1) enacted by the Kentucky General Assembly in its Second Extraordinary Session of 1993 to provide partial funding for Medicaid, the state/federal indigent health care program in which Kentucky voluntarily participates. HB 1 was repealed effective July 14, 1994 and replaced with another health care provider tax, House Bill 250, which differs from HB 1 in several regards. In addition to imposing a tax on physician services, HB 1 imposed a tax on hospital services, nursing facility services, intermediate care facility services for the mentally retarded, home health care services, services of health maintenance organizations, and outpatient prescription drugs. The method of taxation chosen here was but one of several federally permissible health care tax options available to the states. *See* 42 C.F.R. 433.55. The legislature amended HB 1 numerous times before its enactment, and the bill contained significant health care legislation in addition to the provider tax. Contrary to Petitioners' statements, HB 1 was not the "governor's bill." The governor's proposal was contained in House Bill 3 which was considered that session but not adopted.

The trial court held that the challenged statutes were unconstitutional as special legislation under Section 59 of the Kentucky Constitution. Respondents appealed to the Kentucky Court of Appeals and the case was transferred

to the Supreme Court of Kentucky. In reversing the trial court, the Supreme Court of Kentucky rested its decision on state constitutional law. In applying Kentucky Constitution Section 59 to the provider tax statute, the court held that the statute was not special legislation, relying upon *Tabler* v. *Wallace*, Ky., 704 S.W.2d 179 (1985), *cert. denied*, 479 U.S. 822 (1986), *Federal Communications Commission* v. *Beach Communications, Inc.*, ___ U.S. ___, 113 S.Ct. 2096 (1993), *Waggoner* v. *Waggoner*, Ky., 846 S.W.2d 704, *cert. denied*, ___ U.S. ___, 114 S.Ct. 346 (1993), *Reynolds Metal Co.* v. *Martin*, 269 Ky. 378, 107 S.W.2d 251 (1937), *Gillis* v. *Yount*, Ky., 748 S.W.2d 357 (1988), and other state law decisions.

In addressing Petitioners' allegations regarding the three special justices appointed by Governor Jones, the opinion relied upon interpretation of the method of appointment adopted in the Kentucky Constitution. The Supreme Court of Kentucky relied on Section 110 of the Kentucky Constitution and the cases interpreting it, particularly *Ex parte Auditor of Public Accounts*, Ky., 609 S.W.2d 682 (1980), and held that recusal is a personal matter to be decided by each individual justice in the absence of any so-called *per se* disqualification or statutory prohibition. The special justices made such personal review. *See Orders, Yeoman* Pet. 26a-28a. In addition, the court pointed out that the Petitioners' affidavit to the court at no point made any allegations of impropriety, bias or prejudice against the three sitting special justices. *Affidavit of Stuart G. Yeoman, M.D.*, App. 5a-19a. The Petitioners failed to address the issue when offered the chance at oral argument. A unanimous court denied the Petitioners' motions for recusal, determining that the governor properly appointed the special justices in accordance with the Kentucky Constitution.

REASONS FOR DENYING THE WRIT

In finding that the tax imposed on physicians under House Bill 1 does not violate the Kentucky Constitution, the Supreme Court of Kentucky fully considered and correctly applied the relevant sections of the Kentucky Constitution and state cases construing those sections. The court also held that the Petitioners' allegations that the governor's interest in state health care reform and his active participation in the political process did not require recusal of the three sitting special justices appointed by the governor where there was no evidence in the record showing impropriety, bias or prejudice of any of those special justices.

I. THE SUPREME COURT OF KENTUCKY WAS PROPERLY CONSTITUTED WHEN IT INCLUDED SPECIAL JUSTICES APPOINTED BY THE GOVERNOR PURSUANT TO KENTUCKY CONSTITUTION SECTION 110(3).

No special or important issue justifying the grant of certiorari was raised when the Supreme Court of Kentucky held that the Governor followed proper Kentucky constitutional procedure in appointing special justices to the Supreme Court of Kentucky.

A. The Governor Is Required by Kentucky Constitution Section 110(3) to Appoint Special Justices upon the Recusal of Two or More Justices.

Kentucky Constitution § 110(3) provides:

> (3) A majority of the justices of the Supreme Court shall constitute a quorum for the transaction of business. If as many as two justices decline or are unable to sit in the trial of any cause, the Chief Justice shall certify that fact to the Governor, who shall appoint to try the particular cause a sufficient number of justices to constitute a full court for the trial of the cause.

App. 4a.

Three justices of the Supreme Court of Kentucky recused themselves from hearing this case. The lead plaintiff below, Dr. Charles C. Smith, Jr., was the personal physician of Justice Charles M. Leibson. *Order, Yeoman* Pet. 20a-21a. Justice Thomas B. Spain was a member of the Board of Directors and Executive Committee of Trover Clinic Foundation, Inc. Justice Joseph E. Lambert was a member of the Governing Board of the Rockcastle Hospital and Respiratory Care Center, Inc. *Notices of Recusal, Yeoman* Pet. 17a-19a.

After the Chief Justice certified the recusal of the three justices to the governor, Governor Jones appointed three special justices who met the qualifications for a supreme court justice set forth in KRS 21A.120. Those appointments were mandated by Section 110(3) of the Kentucky Constitution. The Kentucky Constitution provides no alternate method of filling vacancies on the court. Indeed, failure to appoint would have been a dereliction of the governor's constitutional duties.

The governor fills vacancies at all levels of the state court system, just as the President of the United States fills vacancies in the federal court system. U.S. Const. art. II, § 2; 28 U.S.C. §§ 44, 133, 171, 251; Ky. Const. § 118. The executive branch's power and duty to make judicial appointments is rooted in the American system of government.

> The constitutional check-and-balance relationship between the executive and judicial branches of the government consists of the provisions for filling vacancies in judicial offices and for the appointment of temporary substitutes when two or more justices of the Supreme Court decline or are unable to participate in the disposition of a cause pending before that court. Const. Secs. 118, 110(3). Those relationships between the legislature and judicial branches exist by virtue of Const. Secs. 110(4), 111(1), 112(2) and (3) and 113(2) and (3), pertaining to judicial districts and number of judges and justices.

Ex parte Auditor of Public Accounts, 609 S.W.2d at 685.

Petitioners do not challenge the constitutionality of Section 110(3), only its application in this case. *Smith* Pet., p. 17. Respondents are in total agreement with the *Smith* Petitioners that "if the Kentucky Constitutional directives in Section 110 and 123 are disregarded, the due process rights of persons subject to the tribunal are violated." *Smith* Pet., p. 14. Thus, as the Petitioners admit, if the governor had not acted in accordance with Section 110(3), their constitutional rights would have been violated.

The Supreme Court of Kentucky unanimously held that the governor acted in accordance with Kentucky Constitution Section 110(3). The disposition of this issue rested wholly on Section 110 and the Kentucky cases interpreting that section. *Commonwealth* v. *Smith*, Ky., 875 S.W.2d 873, 878-879 (1994); *Yeoman* Pet. 31a-49a.

B. Recusal of the Sitting Special Justices Would Have Been Inappropriate Because There Were No Allegations or Evidence in the Record Showing Impropriety, Bias or Prejudice on the Part of Any of Those Justices.

The *Yeoman* Petitioners' affidavit, submitted to the Supreme Court of Kentucky, contained no allegations that any of the three justices who participated in the decision were biased or that they had any pecuniary or other interest in this matter. Instead, the motion for recusal and supporting affidavit consisted of a litany of times and places in which Governor Jones announced his interest in health care reform. In view of the nationwide interest in such reform, this hardly makes the governor unique. The Petitioners' case is based solely upon the premise that because the Governor of Kentucky has publicly stated his position and the goals of his administration regarding the issue of health care he is unable to fulfill his constitutional duty to appoint special justices in this case. If the Petitioners'

argument is followed to its logical conclusion, no United States Supreme Court Justice would be permitted to hear any case involving an issue on which the President appointing such justice has expressed a public opinion.

Although the Petitioners devote several pages recounting the actions and public statements of the governor, the governor is not a party to this action. The key issue is whether the special justices appointed by the governor had any bias or prejudice or otherwise acted improperly thereby disqualifying them from sitting. In *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), this Court held that for recusal to be constitutionally mandated, there must be more than mere allegations of a justice's interest in a case. The *Aetna* Court noted that "accepting appellant's expansive contentions might require the disqualification of every judge in the state."[1] *Id.* at 825. Additionally, when the Petitioners raised specific objections to the appointment of one of the proposed special justices, that person declined the appointment.

In declining to recuse themselves from hearing this matter, each of the special justices followed the procedures for personal review required by KRS 26A.015 and SCR 4.300. These procedures are consistent with those followed in the federal court system which set forth an objective reasonable person standard. 28 U.S.C. § 455(a). *See Yeoman* Pet. 26a-28a. "[A] judge should be disqualified only if it appears that he or she harbors an aversion, hostility, or disposition of a kind that a fair minded person could not

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[1]Contrary to the *Smith* Petitioners' proposed remedy, the Court in *Lavoie* specifically provided the proper remedy when a disqualified justice participates in a decision. The Court held that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings. 475 U.S. at 837. *Smith* Pet., p. 15.

put aside when judging the dispute." *Liteky* v. *U.S.*, ___ U.S.___, 114 S.Ct. 1147, 1158 (1994) (Kennedy, J. concurring). The Supreme Court of Kentucky and the individual sitting justices fully considered the issues raised by their appointment and participation in this case and correctly held that such actions were constitutional on state law grounds and in full compliance with the judicial canons of ethics.

C. A Practicing Attorney May Sit as a Special Justice under Established Kentucky Case Law.

Contrary to the *Smith* Petitioners' argument, although Kentucky Constitution Section 123 prohibits a judge or justice from practicing law "[d]uring his term of office," that section does not apply to special justices. A special justice does not serve a "term of office" since he is not elected for a specific term and acts on a *pro tempore* basis. *Regency Pheasant Run Ltd.* v. *Karem*, Ky., 860 S.W.2d 755, 757 (1993). Further, Kentucky Constitution Section 110(5)(b) prohibits the appointment of an active judge to sit as a special justice on the Supreme Court of Kentucky. *See Kentucky Utilities* v. *South East Coal Company*, Ky., 836 S.W.2d 407, 409, *pet. cert. voluntarily dismissed pursuant to Rule 46*, ___ U.S. ___, 113 S.Ct. 1147 (1992).

D. The Petitioners' Alternate Methods for Choosing Special Justices Have No Constitutional or Statutory Merit.

The Petitioners suggest that the Chief Justice or the Kentucky Bar Association could have appointed the special justices in this case. However, the Chief Justice is prohibited from appointing special justices when three sitting justices recuse themselves. Ky. Const. § 110(3); *Kentucky Utilities* v. *South East Coal Company*, 836 S.W.2d 407. Since the Chief Justice voted with the majority, Petitioners would no doubt complain that the Chief Justice would have been inclined to choose individuals who shared

his beliefs, particularly since the Chief Justice had previously ruled that the Commonwealth had a "strong possibility of success on appeal." *December 21, 1993 Order of the Supreme Court of Kentucky Granting Intermediate Relief Pursuant to CR 76.33*, App. 21a.

The suggestion of an appointment by the Kentucky Bar Association also has no merit, legally or practically. No constitutional or statutory provision even alludes to such a method of appointment. A bar association appointment would place the selection of a special justice in the hands of an individual or group unaccountable to the electorate. Therefore, neither of Petitioners' suggested alternatives have constitutional or statutory merit.

II. THE STATE COURT DECISION SHOULD NOT BE REVIEWED BECAUSE IT IS BASED ON ADEQUATE AND INDEPENDENT NONFEDERAL GROUNDS.

This Court should deny the petitions for writ of certiorari because the decision of the Supreme Court of Kentucky, *Commonwealth* v. *Smith*, 875 S.W.2d 873; *Yeoman* Pet. 31a-42a, rests on the independent and adequate nonfederal grounds of the Kentucky Constitution Section 59 and the state cases construing that section. "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan* v. *Long*, 463 U.S. 1032, 1040 (1983). The grounds for the decision of the Supreme Court of Kentucky are independent because of the unique constitutional provision involved, and adequate because they are broad enough to dispose of this entire issue. *Enterprise Irrig. District* v. *Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

A. The Language and Application of the Special Legislation Prohibition Found in Section 59 are Unique to Kentucky.

Section 59 of the Kentucky Constitution prohibits "special legislation" in the area of taxation and twenty-seven other enumerated areas. Section 59 also provides that "[i]n all other cases where a general law can be made applicable, no special law shall be enacted." Ky. Const. § 59(29), App. 3a. The underlying purpose of Section 59 is to protect citizens without means from lobbyists who influence legislation. *Kentucky Harlan Coal Co.* v. *Holmes*, Ky., 872 S.W.2d 446 (1994).

The Petitioners concede that Section 59 "has long been interpreted as providing greater protection for individual liberty and against arbitrary exercises of legislative power than the United States Constitution and other state constitutions," *Yeoman* Pet., p. 15 n. 2. "When considered against its historical background, it is evident that Section 59 is more than simply another way of restating the generalized language of the equal protection clause of the Fourteenth Amendment to the United States Constitution." *Tabler* v. *Wallace*, 704 S.W.2d 179, 183, *cert. denied*, 479 U.S. 822 (1986). See also *Smith*, 875 S.W.2d at 878; *Yeoman* Pet. 38a. In light of the Court's policy of avoiding adjudication of unnecessary constitutional questions, this Court should not review the Supreme Court of Kentucky's decision. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982); *Kentucky* v. *Stincer*, 482 U.S. 730 (1987).

Section 59 is complex because each factual situation must be judged separately against the state constitutional standard that has evolved in interpreting that section. The *Yeoman* Petitioners cite *Tabler* v. *Wallace*, 704 S.W.2d 179, *Perkins* v. *Northeastern Log Homes*, Ky., 808 S.W.2d 809 (1991), and *Commonwealth* v. *Wasson*, Ky., 842 S.W.2d 487 (1992), for the proposition that Section 59 is consistently invoked to void arbitrary legislation. *Yeoman* Pet.,

p.15 n.2. While the Supreme Court of Kentucky voided the statutes in those cases, many other statutes are held valid under Section 59. In *Waggoner* v. *Waggoner*, 864 S.W.2d 704, the Supreme Court of Kentucky upheld a statutory classification exempting teachers' retirement contributions from consideration as marital property in a divorce proceeding while other pensions were subject to division. Also, in *Sims* v. *Board of Education of Jefferson County*, Ky., 290 S.W.2d 491 (1956), Kentucky's highest court upheld an occupational license tax on the earnings of individuals and profits of businesses to benefit public schools even though the taxpayer had no children in school and received no direct personal benefit. The *Smith* decision is consistent with other recent holdings by the Kentucky appellate courts. *Kentucky Harlan Coal Co.* v. *Holmes*, 872 S.W.2d 446; *Edwards* v. *Land*, Ky. App., 851 S.W.2d 484 (1992). Therefore, no departure from established Kentucky law exists in the instant case. *Cf. Aetna* v. *Lavoie*, 475 U.S. 813.

The Kentucky courts review and weigh each Section 59 case individually. After full consideration of the facts of this case, the Supreme Court of Kentucky rested its decision on Section 59, an independent and adequate nonfederal ground. *Smith*, 875 S.W.2d at 875; *Yeoman* Pet. 31a-32a. Therefore, this Court should deny certiorari.

B. The Kentucky Supreme Court Decision Was Not Based on a Federal Question and Is Not in Conflict with Any Other Federal or State Court Decisions.

While the Supreme Court of Kentucky referred to general constitutional principles in deciding these issues, the court did not construe or directly apply the U.S. Constitution in its decision. Nor did the court decide any matter at issue directly relating to the validity, construction, application or administration of any federal statute, or any right, title, privilege or immunity under any federal statute.

Moreover, the Supreme Court of Kentucky did not decide a federal question in direct conflict with any applicable decision of this Court, the U.S. Court of Appeals, or a state court of last resort. Indeed, the Petitioners fail to identify any such cases. In the only analogous case, the Florida Supreme Court upheld a tax on all physicians licensed to practice medicine in Florida to fund the Birth-Related Neurological Injury Compensation Fund that compensates victims for birth-related neurological injuries. *Coy* v. *Florida Birth-Related Injury Compensation Plan*, Fla., 595 So.2d 943, *cert. denied, sub nom, McGibony* v. *Florida Birth-Related Neurological Injury Compensation Plan*, ___ U.S.___ , 113 S.Ct. 194 (1992). Although not all physicians subject to the tax would benefit from potentially lower malpractice premiums, the *Coy* court found that the tax was sufficiently related to the delivery of health care in general.

The Kentucky Supreme Court's decision in *Smith* referred to "federal criteria" imposed on the states to be eligible to obtain federal matching funds under the Medicaid program. *Smith*, 875 S.W.2d at 875-876; *Yeoman* Pet. 34a. However, those references are simply a recognition by the court of the factual background against which the Kentucky General Assembly enacted the tax provisions in HB 1, and not, as Petitioner *Smith* contends, the court's "misconstru[ction]" and "misapplication" of federal law. *Smith* Pet., pp. 22-25. The determination of whether the provider tax revenues are eligible for match will be made by the federal Health Care Financing Administration. This issue is not before the Court.

The Supreme Court of Kentucky properly recognized that it would have been "illogical" for the legislature not to have "designed" HB 1 "to meet" those federal "requirements as to the class of health care providers that may be taxed in order to qualify for matching funds." *Smith*, 875

S.W.2d at 876; *Yeoman* Pet. 34a. The Kentucky General Assembly, facing a July 1, 1993 deadline for changing Kentucky's existing provider tax, met in special session to find a way to provide money needed to match federal Medicaid dollars. *See* 42 U.S.C. § 1396b(w). Contrary to Petitioner *Smith's* characterization, the Supreme Court of Kentucky did not determine that the federal criteria "compelled" or "mandate[d]" the tax provisions at issue. *Smith* Pet., pp. 24-25. Rather, the court correctly found that the federal criteria were operative facts in the enactment of HB 1, and that "defining the class [of those to be taxed under HB 1] in a coextensive manner with the federal law results in a rational basis for such classification without arbitrariness." *Smith*, 875 S.W.2d at 876; *Yeoman* Pet. 34a.

Federal and state courts have consistently held that legislative bodies possess greater freedom in classifications in the field of taxation than in other areas. *Madden* v. *Kentucky*, 309 U.S. 83 (1940); *Delta Air Lines, Inc.* v. *Revenue Cabinet*, Ky., 689 S.W.2d 14 (1985).

Since the Supreme Court of Kentucky correctly decided the particular issues in this case using state law principles which are not in conflict with federal law or decisions, there is no basis or need for review of those state law issues on a writ of certiorari.

CONCLUSION

Because the Supreme Court of Kentucky did not decide a federal question nor specifically rule on the constitutionality of a state statute under the federal constitution, but declared a tax statute enacted by the Kentucky General Assembly and the appointment of three special justices to be constitutionally sound, no special and important reasons exist for the Court to review this matter.

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

[EXCERPTS FROM KENTUCKY CONSTITUTION]

§ 59. Local and special legislation. — The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:

First: To regulate the jurisdiction, or practice, or the circuits of the courts of justice, or the rights, powers, duties or compensation of the officers thereof; but the practice in circuit courts in continuous session may, by a general law, be made different from the practice of circuit courts held in terms.

Second: To regulate the summoning, impaneling or compensation of grand or petit jurors.

Third: To provide for changes of venue in civil or criminal causes.

Fourth: To regulate the punishment of crimes and misdemeanors, or to remit fines, penalties or forfeitures.

Fifth: To regulate the limitation of civil or criminal causes.

Sixth: To affect the estate of cestuis que trust, decedents, infants or other persons under disabilities, or to authorize any such persons to sell, lease, encumber or dispose of their property.

Seventh: To declare any person of age, or to relieve an infant or feme covert of disability, or to enable him to do acts allowed only to adults not under disabilities.

Eighth: To change the law of descent, distribution or succession.

Ninth: To authorize the adoption or legitimation of children.

Tenth: To grant divorces.

Eleventh: To change the names of persons.

Twelfth: To give effect to invalid deeds, wills or other instruments.

Thirteenth: To legalize, except as against the Commonwealth, the unauthorized or invalid act of any officer or public agent of the Commonwealth, or of any city, county or municipality thereof.

Fourteenth: To refund money legally paid into the State Treasury.

Fifteenth: To authorize or to regulate the levy, the assessment or the collection of taxes, or to give any indulgence or discharge to any assessor or collector of taxes, or to his sureties.

Sixteenth: To authorize the opening, altering, maintaining or vacating of roads, highways, streets, alleys, town plats, cemeteries, graveyards, or public grounds not owned by the Commonwealth.

Seventeenth: To grant a charter to any corporation, or to amend the charter of any existing corporation; to license companies or persons to own or operate ferries, bridges, roads or turnpikes; to declare streams navigable, or to authorize the construction of booms or dams therein, or to remove obstructions therefrom; to affect toll gates or to regulate tolls; to regulate fencing or the running at large of stock.

Eighteenth: To create, increase or decrease fees, percentages or allowances to public officers, or to extend the time for the collection thereof, or to authorize officers to appoint deputies.

Nineteenth: To give any person or corporation the right to lay a railroad track or tramway, or to amend existing charters for such purposes.

Twentieth: To provide for conducting elections, or for designating the places of voting, or changing the boundaries of wards, precincts or districts, except when new counties may be created.

Twenty-first: To regulate the rate of interest.

Twenty-second: To authorize the creation, extension, enforcement, impairment or release of liens.

Twenty-third: To provide for the protection of game and fish.

Twenty-fourth: To regulate labor, trade, mining or manufacturing.

Twenty-fifth: To provide for the management of common schools.

Twenty-sixth: To locate or change a county seat.

Twenty-seventh: To provide a means of taking the sense of the people of any city, town, district, precinct or county, whether they wish to authorize, regulate or prohibit therein the sale of vinous, spirituous or malt liquors, or alter the liquor laws.

Twenty-eighth: Restoring to citizenship persons convicted of infamous crimes.

Twenty-ninth: In all other cases where a general law can be made applicable, no special law shall be enacted.

§ 110. Composition — Jurisdiction — Quorum — Special justices — Districts — Chief justice. — (1) The Supreme Court shall consist of the chief justice of the commonwealth and six associate justices.

(2)(a) The Supreme Court shall have appellate jurisdiction only, except it shall have the power to issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise control of the Court of Justice.

(b) Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules.

(3) A majority of the justices of the Supreme Court shall constitute a quorum for the transaction of business. If as many as two justices decline or are unable to sit in the trial of any cause, the chief justice shall certify that fact to the governor, who shall appoint to try the particu-

lar cause a sufficient number of justices to constitute a full court for the trial of the cause.

(4) The Court of Appeals districts existing on the effective date of this amendment to the constitution shall constitute the initial Supreme Court districts. The general assembly thereafter may redistrict the commonwealth, by counties, into seven Supreme Court districts as nearly equal in population and as compact in form as possible. There shall be one justice from each Supreme Court district.

(5)(a) The justices of the Supreme Court shall elect one of their number to serve as chief justice for a term of four years.

(b) The chief justice of the commonwealth shall be the executive head of the Court of Justice and he shall appoint such administrative assistants as he deems necessary. He shall assign temporarily any justice or judge of the commonwealth, active or retired, to sit in any court other than the Supreme Court when he deems such assignment necessary for the prompt disposition of causes. The chief justice shall submit the budget for the Court of Justice and perform all other necessary administrative functions relating to the court.

COMMONWEALTH OF KENTUCKY

SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY,
REVENUE CABINET, ET AL., - - - - APPELLANTS

v.

CHARLES C. SMITH, JR., M.D., ET AL., - - - APPELLEES

AFFIDAVIT OF STUART G. YEOMAN, M.D.

NOW COMES the Affiant, STUART G. YEOMAN, M.D., and, after being duly sworn, deposes and says:

1. That this Affiant is a physician who practices medicine in Bowling Green, Kentucky, and is one of the Appellees/Movants in the above-entitled case.

2. That this Affiant obtained from the *Louisville Courier-Journal* nearly six hundred (600) news articles in which Governor Brereton C. Jones, both before and during his administration, has commented upon the need for health care reform in Kentucky.

3. That of the aforesaid articles this Affiant obtained, the following are representative of the involvement of Governor Brereton C. Jones in the development and drafting of what became House Bill 1; and, of the fact that he called the Kentucky General Assembly into Extraordinary Session to consider the Bill; that he publicly lobbied for its passage and signed the Bill into law; and that he has publicly commented on the within-styled case:

A. From the start of his political career, Governor Jones has made health care reform one of his highest political priorities. He has repeatedly stated that essential to reform is universal health insurance coverage for all Ken-

tuckians. As early as May, 1989, while he was Lt. Governor and the head of the Kentucky Health Care Access Foundation, Governor Jones endorsed a plan to "expand the Medicaid program to cover all uninsured Kentuckians with incomes less than the federal poverty line." At that time, Medicaid covered only about half of those for whom he sought coverage. He has acknowledged that such an expansion of Medicaid would "cost the State at least $210 million, and is 'totally impractical' in the current financial condition." *Courier-Journal,* May 10, 1989. Exhibit 1.

B. During his campaign for Governor, Jones made health care reform one of his highest priorities. He stated, "we're going to insist on reform, so that we can improve the quality of health care, hold down costs and expand coverage." *Courier-Journal,* October 2, 1991. Exhibit 2.

C. As Governor-Elect, Jones, in November, 1991, stated that proposed changes in Medicaid rules could sidetrack his proposal to expand Medicaid coverage to approximately 225,000 so-called uninsured Kentuckians. Jones said that, if Medicaid changes go through, his proposal is not going to be practical or realistic. *Courier-Journal,* November 8, 1991. Exhibit 3.

D. In his inaugural address, Governor Jones stated, "cooperation and mutual respect will give us a fighting chance to take a national leadership role in providing quality health care for all people." *Courier-Journal,* December 11, 1991. Exhibit 4.

E. In his first State of the State speech (delivered before the Kentucky General Assembly), Governor Jones said, "I cannot and I will not allow a temporary budget problem to deter us from achieving our goals of affordable health care to every Kentuckian." He further stated, "I will appoint a special task force for comprehensive health care reform. This task force will be charged with developing reform recommendations this year because this issue requires action as soon as possible. I will then ask you to consider those recommendations in a special legislative session." *Courier-Journal,* January 14, 1992. Exhibit 5.

F. From the start of his tenure as Governor, Jones has pushed for legislation mandating universal health insurance for all Kentuckians. In February 1992, Representative Joe Clarke said, "That whole special session (on health care reform) concerns me because the Governor has raised expectations that we'll find a solution. But right now I can't think of any comprehensive solution that doesn't call for either reduced benefits or cost a lot more money." *Courier-Journal,* February 8, 1992. Exhibit 6.

G. In March 1992, Governor Jones formed the Commission on Health Care Reform, chaired by Leonard Heller, and the Task Force on Health Care Access and Affordability, chaired by James Newberry. Jones said, "This announcement begins a process that will bring meaningful health care reform to Kentucky." *Courier-Journal,* March 12, 1992 (7). On March 26, 1992, Governor Jones imposed a moratorium on the expansion of health care facilities and services to "clear the decks" for the groups he appointed to come up with health care reform ideas. *Courier-Journal,* March 27, 1992 (8). On April 9, 1992, Governor Jones stated *he planned to call a special legislative session on health care in November of 1992. Courier-Journal,* April 10, 1992 (9). On April 25, 1992, Governor Jones, in a speech in Eastern Kentucky, said, "We are going to take the national leadership role in providing health care." *Courier-Journal,* April 26, 1992. (10) Exhibits 7, 8. *[sic]* 9 and 10.

H. In June 1992, Leonard Heller, Governor Jones' Human Resources Secretary, again stated that Medicaid coverage could be expanded to cover more people, since the program now covers only about half of the people living under the federal poverty line. *Courier-Journal,* June 13, 1992. Exhibit 11.

I. On July 8, 1992, "Governor Jones told a group of legislative leaders that he is fully committed to health care

reform in Kentucky, regardless of how much political capital he must expend, and that any reform measure must address cost containment, malpractice reform and universal coverage." *Courier-Journal,* July 9, 1992. Exhibit 12.

J. On July 10, 1992, at the first meeting of his Commission for Health Care Reform, Governor Jones stated, *"Health Care Reform is this administration's top priority."* He further stated, "The goals of reform would be to provide everyone access to basic, good-quality care and to control costs." *Courier-Journal,* July 11, 1993. Exhibit 13.

K. On July 13, 1992, Governor Jones said that it "is very close to time to go to war to win health care reform in Kentucky." Jones said he *"won't back away from his proposal to treat health care providers like utilities and regulate their rates."* He thinks Kentucky should assert power to set health care rates so as to guard against the unreasonableness of some who are in the profession. In a forum that also featured West Virginia Senator Jay Rockefeller and Pennsylvania Senator Harris Wofford, Jones said he is "very confident the November special session will produce universal coverage and other sweeping reforms in Kentucky." *Courier-Journal,* July 14, 1992 (14). In the same forum, Governor Jones proposed that employers be mandated to provide health insurance to all their workers. *Courier-Journal,* July 15, 1992 (15). Exhibits 14 and 15.

L. On August 9, 1992, Governor Jones stated, in response to an unrelated setback, "this quite frankly, will probably serve as a blessing because it will allow me to take the focus off of things that maybe are not as important as health care reform and put all of our focus on health care." *Courier-Journal,* August 10, 1992. Exhibit 16.

M. In an article in the *Courier-Journal* dated August 19, 1992, it was reported that Governor Jones was still planning on a November Special Session on Health Care, even though he had not yet revealed his own proposals for health care reform to his Commission on Health Care Reform. Key legislators questioned the wisdom of a November Special Session. Joe Clarke said, "I have never thought

shooting for November was wise. I don't see how in the world we can do it now." *Courier-Journal,* August 19, 1992. Exhibit 17.

N. In September 1992, in the plan developed by Governor Jones to his Health Reform Commission, *Governor Jones called for extending the current tax on health care providers used to help fund the Medicaid program to more providers to pay for expanding the Medicaid program.* The plan said the reforms would be financed without a new tax. *But, health care providers and individuals would be expected to pay so the coverage can be provided. Courier-Journal,* September 3, 1992 (18). On September 2, 1992, Governor Jones stated, "I am unwilling to allow any issue to create problems that will stand in the path of our providing health care for every Kentuckian", *[sic]* and that he intends for "health care reform to be the hallmark of his administration". *[sic] Courier-Journal,* September 3, 1992 (19). Exhibits 18 and 19.

O. On September 9, 1992, Governor Jones formally unveiled his health reform plan that called for all Kentuckians to have health insurance by the end of 1993. All employers would have to provide coverage for their employees and the state picking up the cost for the poor. The state Medicaid program would be expanded to fully cover health care for unemployed adults living below the federal poverty level. To pay for the plan, *Governor Jones proposed broadening the existing tax on providers of health services, to obtain additional federal Medicaid money. Courier-Journal,* September 10, 1992. Exhibit 20.

P. On September 18, 1992, Governor Jones, responding to mounting questions about his health care proposals, said, *"I will convene a special session in November regardless of whether the plan is ready or if there are enough votes to pass it." Courier-Journal,* September 19, 1992 (21). In a September 24, 1992 article in the *Courier-Journal,* Governor Jones' problems in gaining support for his health reform plan with legislators was discussed. Representative Kenny Rapier, House Majority Whip, said of

Jones' plan, "There was zero support for it before today, and there's zero today." Both Senator Mike Moloney and Representative Marshall Long questioned financing. *Courier-Journal,* September 24, 1992 (22). On September 24, 1992, Governor Jones backed off his promise to call a special session in November after meeting with Senator John "Eck" Rose and Representative Joe Clarke. Clarke told the Governor he was "losing his capital with legislators" by insisting on the November deadline." *[sic] Courier-Journal,* September 25, 1992 (23). Exhibits 21, 22 and 23.

Q. On November 8, 1992, Governor Jones said in an interview that Kentucky is further along in health reform than the federal government and, "we've got to show the leadership in health care reform". *[sic]* He said *"Kentucky was in a better position to act for the simple reason that this is my No. 1 priority, and I'm willing to spend all of my political capital if necessary to get this done."* *Courier-Journal,* November 9, 1992. Exhibit 24.

R. In response to the Governor, Representative Kenny Rapier stated that small business opposed the mandate for employers to provide insurance coverage for their employees and "knowledgeable House Democrats want to go slow on providing universal health coverage, phasing it in over several years." *Courier-Journal,* November 22, 1992. Exhibit 25.

S. On December 4, 1992, Governor Jones said "he would unveil his revised health care package in the next few days." He said, "the failure to get his health care plan off the ground this year was the *biggest disappointment* of his first year in office." *He further stated he plans to call a special session on health care early in 1993. Courier-Journal,* December 5, 1992. Exhibit 26.

T. On December 8, 1992, Governor Jones said he *"will do whatever it takes to get his health care reform plan passed. When we get this plan together . . . you will see a fight like you've never seen before. You just have to play hardball politics." He said, "this is my No. 1 priority." Courier-Journal,* December 9, 1992. Exhibit 27.

U. On December 9, 1992, *Governor Jones said his revised plan would be financed through cost saving measures and expanding tax on providers. Courier-Journal,* December 10, 1992. Exhibit 28.

V. After Governor Jones presented his revised plan and further modifications, there were still major problems with the Legislature. Speaker Joe Clarke said, "There's no way to pass it, at least not this year. I probably mean next year, too. The problem is in the Governor's insistence on universal access." *Courier-Journal,* March 7, 1993. Exhibit 29.

W. On March 10, 1993, a "health care advisor to the Governor acknowledged that opposition to Jones's two reform plans may mean he'll have to come up with a third one." However, Governor Jones reiterated that any reform plan must extend coverage to all Kentuckians, not just give them a chance to buy it. *Courier-Journal,* March 11, 1993. Exhibit 30.

X. On March 31, 1993, Governor Jones outlined another proposal for universal health care coverage in Kentucky. This proposal created a payroll tax of 3% or 4% and mandated that individuals buy health insurance. Governor Jones "stuck by his insistence that the state should seek immediate, universal coverage for all of its residents." Democratic representatives said mandates and new taxes would be very hard to pass. *Courier-Journal,* April 1, 1993. Exhibit 31.

Y. On April 21, 1993, the *Courier-Journal* reported that *Governor Jones was meeting with lawmakers, one-on-one, to line up support for his health reform plan and to prepare for a special session in May.* But 9 of 10 lawmakers who met with Jones said they can't take firm positions on Jones' plans because Jones has not yet come up with a Bill. *Courier-Journal,* April 21, 1993. Exhibit 32.

Z. On April 23, 1993, *Governor Jones unveiled his health care reform Bill [House Bill 1] and said he will call a special session on May 10.* The Bill [House Bill 1] in-

cludes universal coverage. *"Doctors, hospitals, and other providers would be taxed a percentage of their revenues; they would be prohibited from passing the tax onto consumers in higher charges. [sic] Courier-Journal,* April 24, 1993. Exhibit 33.

AA. An article in the *Courier-Journal,* dated April 27, 1993 states, "Although the Commission on Health Care reform was created by Jones to draft a health care reform package, it only briefly discussed Jones' Bill." *Courier-Journal,* April 27, 1993 (34). On May 5, 1993, Joe Clarke and others recommended delaying the session citing a lack of support for Jones' plan. *Courier-Journal,* May 6, 1993 (35). Exhibits 34 and 35.

BB. On May 7, 1993, *Governor Jones said he will favor Legislators who support his health care plan when he chooses park improvement projects.* The governor made his remarks after Representative Kenny Rapier said he heard reports that Jones is holding projects hostage for votes to pass his troubled health care bill. "If you get to the point where you've got 3 or 4 worthy projects and they're all deserving, and one is sponsored by someone who's for your bill, and the other three are sponsored by someone who's against your bill, which one are you going to go for?" Jones asked. "I'm going to go for the one that was for the bill, of course." *Courier-Journal,* May 8, 1993. Exhibit 36.

CC. A May 11, 1993 article in the *Courier-Journal* stated that Jones shows no backing off on his two main goals: controlling cost and providing immediate universal coverage. Legislative leaders say the state cannot afford immediate universal coverage, and many lawmakers dislike the proposed payroll tax. *Courier-Journal,* May 11, 1993. In the same article, *Jones said he would be the "lobbyist" for 450,000 uninsured Kentuckians,* and that he would provide insurance coverage to some by expanding Medicaid. "Everyone will have to make sacrifices to accomplish his goals", *[sic]*

said Jones, who specifically mentioned health care providers whom he wants to tax to help finance his reform plan. Those who have profited the most from this dollars-driven system must now, in fairness, be asked to give the most." *Courier-Journal,* May 11, 1993. Exhibit 37.

DD. On May 10, 1993, Governor Jones told lawmakers that he will compromise on "100 other issues", *[sic] but not on health care. Courier-Journal,* May 11, 1993. Exhibit 38.

EE. On May 11, 1993, Governor Jones disclosed his estimates of the cost of covering everyone under his bill. About half of the newly covered people would be added to the Medicaid rolls. *The additional cost would be paid by a tax on health care providers. Courier-Journal,* May 12, 1993. Exhibit 39.

FF. Articles from May 13, 1993 (40), May 14, 1993 (41), May 15, 1993 (42), May 17, 1993 (43), May 18, 1993 (44), and May 19, 1993 (45), reveal the interplay between a persistent Governor, pushing for universal coverage and cost-controls, and a Legislature that wouldn't agree with Governor Jones' plan for health reform. *Courier-Journal,* May 13-19, 1993. Exhibits 40-45. Finally, on May 20, 1993, the Special Session collapsed, but House Bill 1 passed. Representative Clarke said that the news that lawmakers had decided to call it quits was quite a shock to the Governor. "I don't think he saw it coming", *[sic]* Clarke said. "Jones repeatedly asked for a couple of days to reflect on this and make a counter proposal", *[sic]* said Senator Charles Berger. "We didn't have much of a discussion", *[sic]* said Senator Fred Bradley. "We had to say the same thing over and over, about 10 or 15 times." *In a later meeting, Jones salvaged a promise of another Special Session on Health Care later this year. Courier-Journal,* May 21, 1993 (46). Exhibits 40-46.

GG. Discussing the Special Session, the *Courier-Journal* related Jones' threats to hold lawmakers hos-

tage until Christmas Day, if necessary, to get his health plan passed. He talked tough about rewarding friends in the Legislature with projects in the $100 million Parks bond issue. *And he threatened in advance of May's Special Session to reconvene the Legislators, ad infinitum, if they sat on his health care initiative. Courier-Journal,* May 23, 1993. Exhibit 47.

HH. In an op-ed piece in the *Courier-Journal,* Governor Jones stated, "The campaign to reform health care in Kentucky is alive and well. To solve, this, the most crucial problem facing our state, first, we must get control of health care costs which are now spiraling out of control. Second, we must see that every Kentuckian has affordable health insurance coverage." *Courier-Journal,* June 20, 1993. Exhibit 48.

II. On June 18, 1993, when informed of a lawsuit planned by the KMA challenging the 2% provider tax, Governor Jones said, through a spokesman, that *he was disappointed by the KMA's decision and that when his goal of universal health insurance coverage is achieved, doctors will be paid for serving indigent people in excess of the 2% tax. Courier-Journal,* June 19, 1993. Exhibit 49.

JJ. Two leading state legislators express doubts on July 16, 1993, that Kentucky will enact health care reform legislation either this year or next year. "I just don't see it happening," said Senator Mike Moloney. Senator *[sic]* Joe Clarke said that expanding the number of Kentuckians who are covered by health insurance would take new state revenue. "I don't see us raising taxes in 1993 or 1994 to take care of health care or to balance the budget", *[sic]* said Clarke. *Courier-Journal,* July 17, 1993. Exhibit 50.

KK. Later in July in a television interview, Joe Clarke told viewers that lawmakers won't be ready for a Special Session "if the Governor takes the position that he has to have universal coverage within his term, that is not in the cards." *Courier-Journal,* July 27, 1993. Exhibit 51.

LL. Governor Jones, in early August, "accused House Speaker Joe Clarke of a flip-flop on the May agreement for saying in a July 18 broadcast interview that the General Assembly would not raise taxes to pay for universal health insurance coverage. *Jones said he plans to call the second Special Session by the end of the year, and the public will know who wants to solve the problem and who doesn't."* Clarke responded saying, "There wasn't any commitment made to any specific package or any specific solution. I had been telling him (Jones) all along there was no support for a tax increase, and that hasn't changed, and he knew that." Jones insisted in an interview that he still considers health care the "most important single issue facing the Commonwealth". *[sic] Courier-Journal,* August 6, 1993. Exhibit 52.

MM. On August 6, 1993, House members indicated that they are willing to enact health care legislation, but they agreed that a tax increase to extend health insurance to all Kentuckians is not feasible in the near future. *Courier-Journal,* August 7, 1993. Exhibit 53.

NN. Finally, on August 12, 1993, Governor Jones said that he's given up pushing for passage of universal health care coverage in a Special Session that could be held in October. Jones said he still wanted universal coverage, "but I think the reality of the situation is telling all of us that it's not going to be done immediately. I have not changed my goal of getting universal coverage as quickly as possible." Jones said he expects the coverage to be phased in beginning with "where the greatest need is and where you can get the greatest return for the dollars invested." He said he would not seek a tax increase in the Special Session. Jones said "that people will be surprised by how quickly universal coverage can be attained." *Courier-Journal,* August 13, 1993. Exhibit 54.

OO. In a report on the Health Task Force dated October 9, 1993, *Governor Jones again stated his de-*

sire for a special session before the end of the year. Jones said he wants the state to set aside any savings it receives in the health care funds in a special trust fund that would be used to extend coverage to the poor. *Courier-Journal,* October 9, 1993. Exhibit 55.

PP. On November 16, 1993, Governor Jones said his plan for universal coverage at controlled cost was stalled by Legislative inaction and "a lot of people making a lot of money who don't want the system to change." *Courier-Journal,* November 17, 1993. Exhibit 56.

QQ. On December 9, 1993, Governor Jones announced that Health and Human Services Secretary Donna Shalala had approved Kentucky's five-year pilot project, which will start July 1. Kentucky can dramatically expand its medicaid program to cover everyone living under the poverty line. This expands health insurance coverage to another 201,000 children and adults. Jones said the plan would still leave an estimated 200,000 to 230,000 Kentuckians without insurance, but would be a major step toward universal insurance coverage. *Jones acknowledged that the Medicaid expansion depends upon the outcome of the court case* (the 2% provider tax on appeal), *but he said he believed the Supreme Court would issue a ruling quickly. Courier-Journal,* December 10, 1993. Exhibit 57.

RR. In mid-December, three Supreme Court Justices, Leibson, Spain and Lambert, disqualified themselves from hearing the appeal of my lawsuit, because of conflict of interest concerns. *Courier-Journal,* January 7, 1994. Exhibit 58.

SS. On January 6, 1994, Governor Jones named three Special Justices to the Kentucky Supreme Court for the appeal involving the health care provider tax: Sheryl G. Snyder of Louisville, Ben S. Fletcher III of Hopkinsville, and Stephen C. Cawood of Pineville. *Courier-Journal,* January 7, 1994. Exhibit 59.

TT. Even after the appointment of the three (3) Special Justices, Governor Jones, in his State of the Commonwealth address, stated:

"A *centerpiece* to the health care financing issue and to the state budget is, of course, the *retention of the provider tax. We must collect this amount of money,* have it more than tripled in Washington, and give it to providers to pay for the health care of thousands of Kentuckians."

Courier-Journal, January 25, 1993; Lexington *Herald-Leader,* January 25, 1993.

4. The foregoing chronology documents that Governor Jones has been, and continues to be, the principal political figure in Kentucky pushing for health reform. Health care reform is "his number one priority", *[sic]* and he has staked all of his "political capital" on accomplishing his two chief goals of health reform: (1) universal insurance coverage for all Kentuckians; and, (2) cost containment.

5. He has relentlessly pushed for universal coverage against a reluctant Legislature, a Legislature that has been bound by budgetary restrains, *[sic]* and the almost unanimous opinion of all Legislators that the enactment of any new general tax measures would be impolitic. The Governor, in the span of several months, has presented various means of trying to accomplish immediate universal health insurance coverage, but has failed to convince the Legislature to enact his comprehensive plans, because of their aversion to any general tax measure.

6. In trying to devise plans for providing insurance coverage for the approximately 450,000 uninsured Kentuckians, the Governor has consistently (in every plan he has presented) relied on the expansion of the Medicaid program to cover those below the federal poverty line, but not currently covered by Medicaid. This encompasses approximately 200,000 so-called uninsured Kentuckians, about one-half of the total so-called uninsured in Kentucky. In each plan, the 2% provider tax was proposed as the revenue measure to provide funding for this Medicaid expan-

sion, a tax on 6,000 physicians, rather than any general tax measure. Then the Governor's plan, when published in the Spring of 1993, stated that the 2% tax on providers' gross revenues could not be passed through to the public by raising fees. This step of making a pass-through of the tax illegal, was the creation of the Governor and first appeared in his House Bill 1.

7. In the Special Session on Health Care in May of 1993, the Governor failed to enact his reform plan. He succeeded in gaining the passage of House Bill 1, which expanded the 2% provider tax to all health care providers, and he was able to have the non-pass-through provision of the tax enacted into law.

8. Subsequent to the failure of the Special Session on Health Care Reform and the Task Force activities of the summer of 1993, Governor Jones was forced to accept the fact that the Legislature was not going to enact universal health insurance for all Kentuckians.

9. Governor Jones, still maintaining that health reform was his number one priority, subsequently decided he would have to phase-in universal coverage. He then applied for, and was granted, a waiver from the federal government to expand Medicaid by 201,000 people. The funding for this expansion of Medicaid was to be, in part, provided by the 2% provider tax.

10. Acknowledging that his plan to expand Medicaid is contingent on continuation of the provider tax, Governor Jones in mid-December was faced with the recusal of 3 of the 7 Supreme Court Justices in his appeal of Judge Crittenden's adverse decision.

11. In naming Sheryl G. Snyder, an executive of ICH Corporation, as a Special Justice, Governor Jones ignores (or knows and understands) the fact that ICH has a contract with the state awarded by the Executive Branch that has paid ICH over 16 million dollars since 1988; ignores (or knows and understands) that ICH donated $5,000 to his inauguration celebration; and (or knows and under-

stands) ignores the fact that Stephen L. Miller, his ex-aide and ex-Campaign Manager, and Miller's law partner, James H. Newberry, Jr., represent ICH. James Newberry also chaired the Governor's Task Force on Health Care Access and Affordability. *Courier-Journal,* March 12, 1992 (7), August 21, 1992 (60), November 15, 1991 (61), March 26, 1992 (62), and January 18, 1992 (63); 8 *1994 Martindale-Hubble Law Directory,* KY 109B-KY 110B (64). See also: *Exhibits 7, 60, 61, 62, 63 and 64.*

12. Governor Jones is a party in interest in the above-styled case; he has an interest in its outcome. This Affiant's success in the case would jeopardize his stated goals. By naming the three (3) Special Justices, Governor Jones is denying this Affiant's right to a fair and impartial hearing in Court.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Stuart G. Yeoman MD
STUART G. YEOMAN, M.D.

STATE OF KENTUCKY }
COUNTY OF }

SUBSCRIBED AND SWORN to before me by STUART G. YEOMAN, M.D., on this the 28 day of January, 1993 *[sic].*

My Commission Expires: 4-3-97.

/s/ Patricia Trotter
NOTARY PUBLIC
KENTUCKY, STATE AT LARGE

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SUPREME COURT OF KENTUCKY

93-SC-946-TG

COMMONWEALTH OF KENTUCKY,
REVENUE CABINET; ET AL., - - - - - - MOVANTS

On Appeal From Franklin Circuit Court
Honorable Roger Crittenden, Judge
93-CI-959

v.

CHARLES C. SMITH, JR., M.D.; ET AL., - - RESPONDENTS

To Be Heard With:

93-SC-944-TG

COMMONWEALTH OF KENTUCKY,
REVENUE CABINET; ET AL., - - - - - - MOVANTS

On Appeal From Franklin Circuit Court
Honorable Roger Crittenden, Judge
93-CI-1275

v.

HEALTH MAINTENANCE ORGANIZATION
ASSOCIATION OF KENTUCKY, INC., ET AL., - RESPONDENTS

ORDER GRANTING INTERMEDIATE RELIEF PURSUANT TO CR 76.33

These cases are before the undersigned pursuant to CR 76.33. Movants have requested a stay of the final judgment/order of the Franklin Circuit Court, pending a decision on the merits by this Court.

Respondents, successfully, in the Franklin Circuit Court challenged the constitutionality of House Bill 1 (Special Session, 1993) which imposed a tax on physicians' services and health maintenance organizations' services. The pro-

ceeds of the tax were earmarked to obtain federal matching money to support Kentucky's extensive Medicaid program.

In the judgment, the trial court, *inter alia,* permanently enjoined the movant Revenue Cabinet from collecting any more taxes under the provisions of HB 1, and ordered the Revenue Cabinet to remit refunds on "taxes already paid" within 90 days of the order. The emphasis of the present motion deals with these two provisions.

Transfer of this case has been granted. By separate order this day, an abbreviated briefing schedule has been designated, and oral argument has been set for February 17, 1994.

For a temporary stay to be granted, the movants must show a possibility of success on the merits of the appeal and must also show that a failure to grant the stay will cause irreparable damage to them.

The basic legal question presented in the underlying case involves the right of the Kentucky General Assembly to establish the classification set out in HB 1, for taxation purposes, under the proscriptions of Sections 59 and 2 of the Kentucky Constitution. The undersigned believes that there is a strong possibility of success on appeal to this Court. Thus, at least in the opinion of the undersigned, the first requirement of CR 76.33 is satisfied.

The question of irreparable injury to the Commonwealth and to the recipients of Medicaid benefits and other clients served by the movants, Cabinet for Human Resources (CHR), is more difficult. It is clear from argument of counsel that if the collection of the tax is stopped, that at least 10% of the so-called "matching funds" (presumably for the next taxing period) will be withdrawn. It is also clear that the amount of money involved is at least 12 Million Dollars and the maximum amount of money is 25 Million Dollars. Although the federal matching funds would not be *immediately* withdrawn (due to the provision of a bureaucratic hearing process) they could be in serious jeopardy at a later time. It is also clear that if CHR was

without the federal matching money, other scarce resources of CHR would have to be used to continue Medicaid services to Kentucky citizens. In any case, it seems to the undersigned that unless CHR reallocates its present resources from currently provided social services, the Kentucky Medicaid program would suffer an immediate loss of 10% (12 Million Dollars or 25 Million Dollars) and that many Kentuckians would suffer a decrease or loss of health care benefits. Clearly this constitutes irreparable damage to the citizens of Kentucky who depend on Medicaid for their health care.

In addition, during argument on the CR 76.33 motion, counsel for certain respondents conceded that they have no basic objection to staying the portion of the order of the Franklin Circuit Court that ordered refunds to be made to their clients within 90 days of the entry of that order. Such time frame is unworkable as the matter is currently on appeal and is not final until a final ruling by this Court is entered.

The motion for relief pursuant to CR 76.33 is granted, and the judgment/order of the Franklin Circuit Court dated November 23, 1993, is stayed pending the final decision of this Court.

ENTERED: December 21, 1993

/s/ Robert F. Stephens
Chief Justice